(2)

No. 91-1695

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PIONEER INVESTMENT SERVICES COMPANY,
Petitioner,

v.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP, AND WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Petition for Writ of Certiorari is jurisdictionally out of time because Petitioner's tender of a Petition conforming to the Supreme Court Rules occurred almost three months after the final date for filing the Petition.
2. Whether this Court should review the definition of "excusable neglect" under Bankruptcy Rule 9006(b)(1) when the particular circumstances of this case make it highly unlikely that a creditor of a bankrupt debtor will file its proof of claim late for the same reasons.
3. Whether this Court should review the interpretation of "excusable

neglect" under Bankruptcy Rule 9006(b)(1) when (a) a fundamental analysis of the logical definition of "excusable neglect" necessarily includes the consideration of equitable factors and (b) the needs of Chapter 11 cases permit a more flexible approach than the one urged by Petitioner in this case.

PARENT COMPANY AND CORPORATE SUBSIDIARIES/AFFILIATES OF RESPONDENTS

The following is a list of the corporate general partners for each of the Respondents:

(a) Brunswick Associates, Limited Partnership - Robriste Enterprises, Inc., General Partner

(b) Clinton Associates, Limited Partnership - Robriste Enterprises, Inc., General Partner

(c) Ft. Oglethorpe Associates, Limited Partnership - Pudding Enterprises, Inc., General Partner

(d) West Knoxville Associates, Limited Partnership - Robriste Enterprises, Inc., General Partner

The corporate general partners do not have any parent or subsidiary corporations.

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PROVISIONS OF LAW

1. Supreme Court Rule 13.4 provides in pertinent part:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered . . . . However, if a petition for rehearing is timely

> filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing . . . . A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

2. Bankruptcy Rule 3002(c) provides in pertinent part:

> In a Chapter 7 liquidation . . . case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code . . . .

3. Bankruptcy Rule 9006(b) provides in pertinent part:

> (3) ENLARGEMENT. The court may enlarge the time for taking actions under Rules . . . 3002(c), only to the extent and under the conditions stated in those rules.

4. Supreme Court Rule 33.7 provides in pertinent part:

> The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but

> shall return it indicating to the defaulting party any failure to comply. The filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted.

STATEMENT OF THE CASE

On April 12, 1989, the Petitioner, Pioneer Investment Services Company ("PISCO"), filed a Petition for Reorganization under Chapter 11 of the United States Bankruptcy Code, coupled with a list of its 20 largest unsecured creditors. This list included Respondents Brunswick Associates Limited Partnership ("Brunswick"), Clinton Associates Limited Partnership ("Clinton") and West Knoxville Associates Limited Partnership ("West Knoxville") (collectively, "Respondents"). Respondent Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe") was not listed. On the same day, the bankruptcy court entered its routine order entitled "Notice for Meeting of Creditors"

(the "Notice") setting (a) May 5, 1989 as the date for the creditors' meeting required under § 341(a) of the Bankruptcy Code and (b) a "bar date" of August 3, 1989. This Notice provided in relevant part:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. § 1111 & Bankruptcy Rule 3003.
>
> Bar date is August 3, 1989.

The Respondents retained as legal counsel Marc Richards ("Richards"), who at that time was with the New York firm of Myerson & Kuhn.

PISCO requested and was granted two extensions by the bankruptcy court through May 17, 1989, within which to file its Statement of Affairs and Bankruptcy Schedules. On May 18, 1989, one day late, PISCO filed its Statement of Affairs and Schedules of Assets and Liabilities. The Respondents, however, were not scheduled as

creditors although three of them previously had been listed on PISCO's list of its 20 largest unsecured creditors.

The first meeting of creditors was held on May 19, 1989. Shortly after this meeting, PISCO filed an amended Schedule of Assets and Liabilities listing Brunswick, Clinton and West Knoxville as having contingent, unliquidated and disputed claims. On June 2, 1989, 16 days late, PISCO filed an amended list of its 20 largest unsecured creditors. None of the Respondents were included on that list. On June 5, 1989, the United States Trustee appointed an official committee of unsecured creditors, including Clinton.

On July 31, three days before the "bar date" set forth in the Notice, PISCO filed the first of three motions for an extension of time to file its plan of reorganization. The bankruptcy court granted this motion and gave PISCO an additional 60 days in

which to file its plan. On November 8, 1989, PISCO requested a second extension, until November 14, 1989, to file its plan. This request was granted without objection. PISCO, however, missed this deadline also. On December 15, 1989, a day after the extension had expired, PISCO submitted a third motion for yet another extension of the exclusive period for filing its plan. PISCO finally filed its plan of reorganization on January 2, 1990.

Precisely 20 days after the expiration of the August 3, 1989 "bar date," the Respondents filed their first and only motion for an extension of time: a motion to extend the time to file their proofs of claim or, in the alternative, to allow the filing of their proofs of claim *nunc pro tunc* August 3, 1989. With their motion, Respondents tendered proofs of claim totaling $6,943,139. After an evidentiary hearing, the bankruptcy court, by order

dated October 10, 1989, denied the motion for extension of time. Respondents appealed that denial and on February 20, 1990, the district court reversed the bankruptcy court's ruling.

The district court held that the bankruptcy court had applied an overly strict standard of "excusable neglect," under Bankruptcy Rule 9006(b) by permitting the late filing of proofs of claim only when the failure to timely file is due to circumstances beyond the creditors' reasonable control. The district court instructed the bankruptcy court to consider the following equitable factors derived from the opinion of the Bankruptcy Appeals Panel for the Ninth Circuit in In re Dix, 95 B.R. 134 (9th Cir. B.A.P. 1988): (1) whether granting the extension would prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the creditor

acted in good faith; (4) whether clients should be penalized for their attorney's mistake or neglect; and (5) whether the delay was beyond the reasonable control of the person whose duty it was to perform. In addition, the district court instructed the bankruptcy court to consider whether Respondents' failure to timely file their claims resulted from "negligence, indifference or culpable conduct" on the part of the Respondents or their counsel, following the standards set forth in INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391 (6th Cir. 1987).

On June 8, 1990, the bankruptcy court conducted another hearing. The bankruptcy court made no further findings of fact but held that even under the more liberal interpretation of "excusable neglect," there was no basis for allowing the Respondents to file their claims 20 days

late. The Respondents again appealed to the district court which affirmed the decision of the bankruptcy court on September 12, 1990. Respondents timely appealed to the United States Court of Appeals for the Sixth Circuit.

The Sixth Circuit reversed. The Sixth Circuit disagreed with the bankruptcy court's original decision to adopt the strict interpretation of "excusable neglect" and upheld the district court's decision that the more liberal approach to the concept of excusable neglect was the proper one. It also held that four of the five Dix factors were weighed in favor of the Respondents, and concluded that the bankruptcy court "inappropriately penalized the plaintiffs for the errors of their counsel" because the failure to file the proofs of claim on time were due in large part to the fact that Respondents' counsel affirmatively told Respondents that there

was no urgency with respect to the filing deadline and that Respondents relied on that advice.

One of the pivotal bases of the Sixth Circuit's decision was that the notice containing the "bar date" was incorporated in a document entitled "Notice for Meeting of Creditors" and that this designation would not serve to put those persons without extensive bankruptcy experience on notice that the date reflected at the end of the notice was intended to be the final date for filing of a proof of claims. The court noted that Official Bankruptcy Form 16 provided a model for notifying creditors of a proof of claims deadline in a Chapter 11 bankruptcy.1/ The Sixth Circuit then compared the clarity of Form 16 with the ambiguity in the Notice sent to Brunswick,

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1/ Official Bankruptcy Form 16 has been revised and is now incorporated as Official Bankruptcy Form B9F. A copy of this form is included at 1a., Appendix infra.

Clinton and West Knoxville: "This ambiguity is exacerbated by the fact that the notice was simply and inconspicuously labeled 'Bar date' without any reference to its significance as a deadline for the filing of proof of claims. Even persons experienced in bankruptcy might confuse such a label for other deadlines." (Petitioner's App. A., 10a.) The court concluded that although Berlin (President of Respondents' corporate general partners) was an experienced businessman, he had no expertise in bankruptcy and that even if he had seen the Notice he would not have understood necessarily the significance of the date contained therein. Id.

In the final paragraph of its opinion, the Sixth Circuit held that in the context of default judgments, "absent prejudice to the plaintiff or culpable conduct on the part of the defendant, the policy of hearing claims on the merits weighs in

favor of allowing the claims to go forward." The court added that the same considerations should apply analyzing a failure to meet a filing deadline for proof of claims where the fault is clearly attributable to the attorney, and no prejudice results to the debtor.

PISCO filed a Petition for Rehearing and Suggestion for Rehearing in Banc which the Sixth Circuit denied on October 28, 1991.

On January 27, 1992, PISCO tendered its Petition For A Writ of Certiorari, which was rejected by the Clerk of this Court because it did not conform to the Supreme Court Rules (the "Rules"). On March 9, 1992, PISCO again tendered a Petition For A Writ of Certiorari, which the Clerk once again rejected as nonconforming. Finally on April 21, 1992--almost three months after the required filing date--PISCO finally tendered a

Petition which complies with the Rules of this Court.

ARGUMENT

I. PETITIONER'S FILING OF ITS PETITION FOR WRIT OF CERTIORARI IS JURISDICTIONALLY OUT OF TIME.

This Court recently has explained that the time for filing a petition for writ of certiorari is a jurisdictional requirement with which petitioners must comply in order to have access to this Court's review process:

> (1) the 90-day limit is mandatory, and jurisdictional, and (2) the United States Supreme Court has no authority to extend the period for filing except as Congress permits; . . . unless the . . . petition for certiorari was filed within 90 days of the entry of the Court of Appeals' judgment, the Supreme Court must dismiss the petition.

Missouri v. Jenkins, 495 U.S. 33 (1990).

PISCO was required to file its Petition within 90 days after October 28, 1992, the date its petition for rehearing was denied. Rule 13.4. PISCO made its first effort to tender its Petition on

January 27, 1992. That version and a second version tendered a month and a half later were rejected because they did not conform to the requirements of the Rules. PISCO waited more than another month to tender its third version which was finally accepted by the Clerk in late April 1992.

Rule 33.7 of this Court provides that filings which the Clerk returns as nonconforming are not to be deemed untimely if proper copies are provided "promptly." In this case, PISCO's filing of a proper petition almost three months after the due date cannot be considered to have been done "promptly." The petition should therefore be dismissed.

Dismissal is especially appropriate because this case involves the issue of timely compliance with procedural rules. After arguing that Respondents' proofs of claims should not be filed late, it is ironic indeed for PISCO now to fail to

comply timely with a jurisdictional filing requirement. If this Court is to review the parameters of "excusable neglect" in the context of a late filing, as PISCO urges it to do here, it should do so in a case in which the Petitioner itself has strictly complied with the time limits for filing its Petition For A Writ of Certiorari. PISCO's own neglect causes this to be an inappropriate case in which to review the questions presented.

II. THIS COURT SHOULD NOT REVIEW THE DEFINITION OF "EXCUSABLE NEGLECT" BECAUSE THE CIRCUMSTANCES OF THIS CASE MAKE IT UNLIKELY THAT A CREDITOR OF A BANKRUPT DEBTOR WILL FILE ITS PROOF OF CLAIM LATE FOR THE SAME REASONS.

This Court should not grant the writ because the facts in this case, especially the bankruptcy court's use of a very misleading form of "bar date" notice, are not likely to reoccur. The Sixth Circuit found it very significant that the "bar date" was cryptically imbedded in a

document entitled simply "Notice for Meeting of Creditors." The circuit court suggested that the very title of the Notice was misleading because it explicitly conveyed a singular, limited purpose. As the court noted, the mere words "Bar date," with no explanation of or reference to the filing of proofs of claims, added to the confusion. The ambiguity of the bankruptcy court's Notice contrasts sharply with the clarity provided by Official Bankruptcy Form 16 (now revised as Official Bankruptcy Form B9F). The official form leaves no doubt as to its purpose or as to when a creditor must file his proof of claims. This official form is now used today by the vast majority of bankruptcy courts.

The recent development of Official Bankruptcy Form 16 (now revised as Official Bankruptcy Form B9F), make it clear that the resolution of this issue is unnecessary at this time. Future claimants in Chapter

11 cases will be unable to argue, and courts will be unlikely to find, that the notice of bar date included in the Official Form lacks appropriate, clear instructions or is ambiguous, as was the Notice in this case. Instead, the revised Official Bankruptcy Form B9F clearly and adequately informs all creditors of their claim filing obligations. See Appendix at 5a. Thus, the likelihood of another case arising under similar facts is much diminished today, eliminating the need to review the definition of "excusable neglect" under these circumstances.

III. THIS COURT SHOULD NOT REVIEW THE INTERPRETATION OF "EXCUSABLE NEGLECT" BECAUSE AN ANALYSIS OF THE LOGICAL DEFINITION OF "EXCUSABLE NEGLECT" NECESSARILY INCLUDES THE CONSIDERATION OF EQUITABLE FACTORS, AND THE NEEDS OF CHAPTER 11 CASES PERMIT A MORE FLEXIBLE APPROACH THAN THE ONE URGED BY PETITIONER IN THIS CASE.

The basic distinction between a liberal and strict standard of excusable neglect is that the former permits--indeed,

requires--the consideration of equitable factors. See Dix, supra. Excusable neglect under the more strict interpretation urged by PISCO exists only when the failure to timely perform was due to circumstances "beyond the reasonable control" of the party. This "beyond reasonable control" test is inconsistent with a logical definition of excusable neglect, because if something is beyond a person's control he cannot have been neglectful. Instead, the appropriate concern under such a standard should be: (1) whether there is "neglect", and (2) if so, whether such neglect is "excusable." See Consolidated Freightways Corp. v. Larson, 827 F.2d 916, 919 (3rd Cir. 1987).

The bankruptcy court, however, improperly elevated this "beyond reasonable control" element as the most important part of the Dix test. Logically, however, the other factors--good faith, lack of

prejudice to the debtor, lack of impact on court administration, and whether the clients should be penalized for their attorney's neglect (all of which the Sixth Circuit resolved in Respondents' favor)--are more relevant when determining whether any neglect is "excusable" than is the single "beyond the reasonable control" element.

The Sixth Circuit's adoption of a liberal interpretation of "excusable neglect" in a Chapter 11 case also is more consistent with the bankruptcy rules and the needs of a Chapter 11 case. For good reason there are vast differences between Chapter 7 liquidation deadlines and Chapter 11 reorganization deadlines. Except for certain narrow exceptions, the deadline for filing a proof of claim in a Chapter 7 liquidation case is absolute. See Bankruptcy Rule 3002(c). Moreover, the general standard of excusable neglect for

late filings under Bankruptcy Rule 9006(b) cannot be considered for late filings of Chapter 7 proofs of claim. See Bankruptcy Rule 9006(b). In contrast, the deadline for filing Chapter 11 proofs of claim is not absolute and the exceptions are not as restrictive. Bankruptcy Rule 3003(c), unlike Bankruptcy Rule 3002(c), expressly allows the deadline for filing Chapter 11 claims to be extended for "cause." Thus, while a Chapter 7 creditor may not obtain a late extension of time unless it is within the narrow exceptions of Bankruptcy Rule 3002(c), a Chapter 11 creditor may obtain an extension upon a showing of "cause" or "excusable neglect." 8 Collier on Bankruptcy ¶ 3003(05)[4] (16th ed. 1989) ("Unlike Bankruptcy Rule 3002, Bankruptcy Rule 3003(c) does not set up a statute of limitations leaving the court with no discretion to allow late filed claims").

In In re Chicago, Rock Island & Pacific R. Co., 788 F.2d 1280, 1281 (7th Cir. 1986), the Seventh Circuit discussed the purpose of a Chapter 11 proof of claims deadline:

> The setting of a deadline, in advance of approval of the plan of reorganization, for filing claims, and the barring of claims filed beyond the deadline is a familiar and sensible measure in a reorganization proceeding and . . . is currently authorized by Bankr.R. 3003(c)(3). It creates a mechanism by which the trustee in bankruptcy can estimate the potential liabilities of the bankrupt in advance of formulating a plan of reorganization.

Thus, the claim filing deadline in a Chapter 11 case is most important when the debtor is in the process of formulating a plan of reorganization. If creditors are permitted to file proofs of claim at any time after the debtor's disclosure statement and proposed plan of reorganization are filed, the debtor could be forced to amend its plan and disclosure statement. The resulting delay necessarily

would adversely impact court administration and the resolution of the debtor's bankruptcy case. The debtor and other creditors would be prejudiced. In a large bankruptcy case such as this one, however, the debtor may not begin formulating a plan for many months. Thus, short delays early in the case usually will not be prejudicial. The bankruptcy rules recognize this by permitting courts to be flexible in permitting time extensions for "cause" or when the neglect causing a late filing is "excusable."

In this case, after obtaining several time extensions (one of which was applied for late, without excuse), PISCO did not file its plan and disclosure statement until over four months after the Respondents tendered their proofs of claim. Further, this plan and disclosure statement were amended several times. In short, the Sixth Circuit properly interpreted the

Bankruptcy Rules as allowing the court the flexibility to permit the late filing where the debtor's own repeated delays and time extensions caused Respondents' 20-day delay to be insignificant.

Finally, the consideration of equitable factors such as those outlined in Dix comports with the analysis undertaken by courts faced with determining whether a party has shown the requisite "good cause" for setting aside a default judgment. See, e.g., INVST, supra; United Coin Meter Co., Inc. v. Seaboard Coastline R.R., 705 F.2d 839 (6th Cir. 1983). Generally these courts find the most significant factors when making such determination to be whether the plaintiff will be prejudiced if the default is set aside, whether the defendant has a meritorious defense and whether culpable conduct of the defendant led to the default. By refusing to file Respondents' proofs of claim, the

bankruptcy court was, in effect, entering a default judgment against them. The very same factors that courts use to analyze the propriety of a request to set aside a default judgment are appropriate in determining whether a late-filing creditor has shown the requisite excusable neglect under Bankruptcy Rule 9006(b)(1). For these and the other reasons stated by the Sixth Circuit in its opinion, its holding was correct and should not be reviewed by this Court.

CONCLUSION

The Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES BANKRUPTCY COURT

Eastern District of Tennessee

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 of the BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Case)

Case Number:
Date Filed (or Converted) :

IN RE(NAME OF DEBTOR) ADDRESS OF DEBTOR

NAME/ADDRESS OF ATTORNEY FOR DEBTOR

TELEPHONE NUMBER:

NAME/ADDRESS OF TRUSTEE

TELEPHONE NUMBER:

DATE/TIME/LOCATION OF MEETING OF CREDITORS

[ ] Corporation [ ] Partnership

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all

documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the

debtor should review Sec. 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(a)(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from

time to time by notice at the meeting, without further written notice to the creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. The deadline for filing a proof of claim is set out below. A creditor who desires to rely on the schedules of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of

claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

Filing Claims: Deadline to file a Proof of claim is [Date]

For the Court: _____
Clerk of the Bankruptcy Court

Date: _____ FORM B9F 0001